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# China's Family Law in Action: An Introduction<sup>1</sup>

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## PROLOGUE

The family is an aspect of social life that is generally influenced strongly by the culture within which it is embedded. The norms which have evolved in order to regulate family relationships and conduct within a society tend as a result also to be strongly infused with entrenched social norms and cultural values. In the case of the mainland People's Republic of China (PRC) after 'Liberation' in 1949, the new authorities operating under the leadership of the China Communist Party (CCP) attempted to refashion the family dramatically, in particular by imposing a new 'democratic marriage system' infused with socialist principles that would enable family members to escape oppressive legal and social norms stretching back many centuries:

The feudal marriage system which is based on arbitrary and compulsory arrangements and the superiority of man over woman and ignores the children's interests shall be abolished.

The New-Democratic marriage system, [Xin minzhu zhuyi hunyin zhidu] which is based on the free choice of partners, on monogamy, on equal rights for both sexes, and on the protection of the lawful interests of women and children, shall be put into effect.<sup>2</sup>

<sup>1</sup> We should like to thank Shelby Chen, Fu Hualing and Zhao Yun of the University of Hong Kong Law Faculty and other speakers and discussants who contributed to the 27 April 2019 Conference on 'Chinese Family Law in Action', held at the Cheng Yu Tung Tower, HKU, as well as to Amy Kellam, Yi Seul Kim, Lin Yang and Zhou Ling for their editorial support. The Conference was organized by He Xin, and we are grateful to the Humanities and Social Sciences Prestigious Fellowship Scheme (project no. 37000819) and the HKU Law Faculty for funding support.

<sup>2</sup> Article 1, 1950 Marriage Law of the PRC. This code covered far more aspects of family life than its title suggested, and was intended to bring radical change to family relationships more generally. The essay in this Special Issue contributed by Wang Juan and Mu Hongqin entitled 'It's Not Just About the Divorce': Law, Politics, and Mediation in Communist China' deals with aspects of the institutionalisation of the new Marriage Law.

Some 20 years earlier, the Republic of China authorities<sup>3</sup> also had attempted to implement family law reforms through Books IV and V of the 1930 Civil Code. In the Introduction to the published version of Code, the Chair of the Civil Codification Commission declared:

The reform of the Chinese family system constitutes one of the most important items of the Kuomintang programme for the political and social rehabilitation of China [...] and to enable the citizens to make use of their personal abilities to the best interest of their country, it was imperative that the excessive grip of the old family ties over the individuals should be loosened.<sup>4</sup>

However, attempts at such reform in a society of China's size and complexity, entrenched patriarchal familial consciousness (in which relationships within the family were governed by ethical as well as legal norms), and strong historical awareness have been, and still are, difficult to put into effect. As a result, the observer necessarily must examine not only the legal framework for the family per se but also the ways in which legal norms are applied in action. On the one hand, the ways in which the law and its intended application are shaped by top-down pressures including broad policy considerations, and ideals of morality are also important. But, in addition, and on the other hand, at the local level the law flowing from above may be filtered, avoided, or rejected by judicial decision making, social practice (especially as reflecting familial values), customary norms and traditional ideals, and otherwise responded to in ways in which the legislation neither intended nor anticipated.

Marriage was traditionally (and is still) regarded as a critical event for the family in Chinese society, and the ideal status for an adult continues to be that of a married person, despite much social change over the past thirty years or so. The role of the wife by tradition was to serve and obey the family into which she married, and to continue the line or lines of patrilineal descent through giving birth to male children for her husband. This role continues to be the perceived by many men, especially in the contemporary Chinese countryside, as the appropriate place for women in family life. In the post-Mao era of economic reform and rapid social change, family life has nevertheless become more private and less stable. The wife is often more central than in the past in decision-making about living arrangements and family composition. Nevertheless, as we have suggested, within the family, the position of married women has often continued to be difficult, with marital dissatisfaction, marital conflict, and domestic abuse increasingly important issues.<sup>5</sup>

However, troubled matrimonial relationships do not necessarily lead to dissolution. A range of cultural and socioeconomic issues such as conservative social attitudes, state policies promoting the ideal of the family as a basic social unit of care, and processes such as evaluative mediation aimed at reconciliation of the parties, help to explain the relatively

<sup>3</sup> In addition, in the areas of China that the forces of the Communist Party occupied, significant reforms to the regulation of marriage and the family were carried out in the 1930s and 1940s. See Meijer, Marinus J (1971). *Marriage Law and Policy in the Chinese People's Republic* Hong Kong University Press.

<sup>4</sup> Foo Ping Sheung (1931) 'Introduction' to the English translation of the *Civil Code of the Republic of China* Books IV and V Kelly and Walsh Limited, at vi and vii.

<sup>5</sup> See He, Xin and Kwai Ng (2013) 'In the Name of Harmony: the Erasure of Domestic Violence in China's Judicial Mediation' in Guiguo Wang and Fan Yang eds *The Rule of Law: A Comparative Perspective* City University of Hong Kong Press 107 (republished from (27, 1) *International Journal of Law, Policy and the Family* 97); Palmer, Michael (2017) 'Domestic Violence and Mediation in Contemporary China' in Fu, Hualing and Michael Palmer (eds) *Mediation in Contemporary China: Continuity and Change* 286;

low divorce rate in post-reform China in comparative terms. The essays in the Special Issue look at important issues in and key aspects of judicial and administrative treatment of women in troubled marriages, and how their troubles persist despite substantive law promoting gender equality.<sup>6</sup>

It should be added here that from the time of imperial statutory law, through the Republican period, and under socialist (CCP) rule post 1949, the law has provided for divorce by mutual consent. Until recently in the PRC, this has been a relatively non-contentious dimension of the divorce process not only at the level of the parties themselves but also in wider society. This imperial tradition of allowing such divorce has thus persisted through to the present day. In general, it has been relatively routine and in the PRC today is a matter handled by administrative organs rather than by the courts. The contributed papers on divorce in this Special Issue, however, for the most part deal with the more difficult issue of contested divorces, as handled and decided upon by the courts, although some of the controversy as we shall see, has now descended on divorce by mutual consent.

### THE STATE, CONFUCIAN IDEOLOGY, AND THE STRUGGLE FOR REFORM

The regulation of the family in imperial times (that is, up to 1911) was deeply embedded in the patriarchal values of Confucianism. The norms for correct conduct within the family and household were widely disseminated moral norms of Confucianism. Especially important such norms were the five human relationships (*wulun*) in which ties between family members were characterised as ones of domination and subordination: the son to the father, younger brother to older brother and wife to her husband (and by extension in practice, to his parents). This family formation was critically important, and placed women as daughters, wives, and mothers in a subordinate position. More specifically, for women there were the expectations of the 'three obediences' and 'four virtues' (*san cong si de*). The 'three obediences' required women to be in a continuing state of subjugation as they moved through the family life cycle: 'be obedient to one's father prior to marriage' (*wei jia cong fu*), 'be obedient to one's husband once married' (*ji jia cong fu*) and 'be obedient one's sons in widowhood' (*fu si cong zi*). Moreover, four feminine virtues served as additional role prescriptions, requiring from women that they exhibit 'female virtue' (*fude*), 'proper female speech' (*fuyan*) 'modest female appearance' (*furong*) and 'diligent female work' (*fugong*).<sup>7</sup>

Family property too was patriarchally organized. Male members of the family *jia* were 'co-owners' of the family estate—they were coparceners, inheriting the family property equally through succession following, typically, the death of the family head.<sup>8</sup> Females within the family were entitled to support from the family estate. They might, somewhat paradoxically unlike their brothers, also hold some private property, typically as a result of a dowry gift. As Professor Shiga, the much-respected Japanese commentator on traditional Chinese law and society has emphasized, the property basis of the family was

<sup>6</sup> Ibid.

<sup>7</sup> Gao Xiongya (2003) 'Women Existing for Men: Confucianism and Social Injustice against Women in China' (10, 3) *Race, Gender & Class* 114.

<sup>8</sup> On the eldest son's extra share see McAleavy, Henry (1958) 'Varieties of "hu'o'ng-hoa" ([Xiang] [huo]): A Problem of Vietnamese Law' (21, 1-3) *Bulletin of the School of Oriental and African Studies* 608 at 611.

one of *tongju gongcai* or 'cohabiting, with assets pooled', and this defined the status of male family members—in particular, those who were part of the pooled assets system were *ipso facto* family members (even when not actually physical resident in the family residence). They contributed to the family budget, and shared in its benefits.<sup>9</sup> The father was seen as infusing some of his spirit, his essence (*qi*) into the son: they were 'one body' (*yiti*) united by Heaven. The relationship between husband and wife on the other hand was characterized as artificial and the authority of the husband was not as comprehensive as that of the father, so that for example, intended bridegroom and bride were not the principals to their wedding contract: that role was performed by their respective family heads (*jiazhang*). Since the purpose of marriage was of the continuation of the patriline, so in Confucian ethics marrying one's sons was seen as filial duty of the family head.

The imperial state's concern with the family was thus largely to provide a set of rules, mostly penal and administrative in nature, that stipulated punishment for those who transgressed the relevant Confucian precepts relating to family relations and thereby jeopardized public order, and which promoted collection of taxes in the sense of providing a system of household registration. Civil law for the large part took the form of local customary norms, and was often informed by Confucian values, and applied by local leaders in villages, lineage communities, and inter-village organizations, so that family and other civil disputes ordinarily were not taken to the magistrate. This also meant that local norms regarding marriage and family relations were often quite varied and not always in practice consistent with imperial statutory law.<sup>10</sup> Overall, the resulting family culture may be best characterized as traditional familism (*jiahuzhuyi*).

### Position of the Wife

Within the family, the wife was subordinate not only to the husband but also her husband's parents, with whom she ordinarily lived as marriage was predominantly patrilocal. The position of the wife in the *jia* was equal to a daughter of the house—she owed an obligation of filial piety to her husband's parents. She was not the equal of her husband. She owed obedience to her husband and was required to mourn for him for three years, just as a son was obligated to do for his father.

### Divorce: patriarchy in command

Marriage was dissolved by death or divorce. Although divorce in traditional China was not common,<sup>11</sup> the regulation of wife-husband relations, including termination of their ties, was infused with patriarchal values. The statutory rules operated in favour of the husband and his parents. Adultery and unfilial conduct towards parents-in-law were of course

<sup>9</sup> There were two broad exceptions: where a son in the family was absent for reasons of government service or because of his participation in long-distance trade.

<sup>10</sup> See, for example, Wolf, Arthur P, and Huang, Chieh-shan (1980) *Marriage and Adoption in China, 1845-1945* Stanford University Press.

<sup>11</sup> One important reason for this was that the law permitted the husband to take a concubine or secondary wife, often for the purposes of giving birth to a male child and successor, making divorce unnecessary. The punishments imposed on concubines for offences against the husband and his family were greater than for the main wife.

grounds for divorce, or locally applied punishment if handled unofficially. Several kinds of divorce were available, including judicial divorce following one of seven intolerable acts by the wife (*qichu*) (the 'seven outs'), with limited defences for the wife against her husband's decision-making. In addition, there was provision for divorce by mutual consent (*heli*), which included consent of the husband's parents and which in practice was often something of a legal fiction: 'a husband may force his wife to divorce him and yet be able to employ the form of divorce by mutual consent'.<sup>12</sup> Thus, divorce by mutual consent was equal to 'divorce by unilateral intention. Most cases were initiated by the husband, and the wife was forced to accept. Since men were regarded as superior to women, it was very rare for a wife to initiate a divorce action, for it was unlikely that it would be willingly accepted by her husband'.<sup>13</sup> On the other hand, exiting an unhappy marriage for a woman was very difficult, and if her husband died there was a societal and legal preference for the wife to remain with her husband's family rather than to remarry.

### Adultery and homicide

Given the continuing significance in the PRC of these traditional familial values and practices, as well as their intrinsic importance, this Special Issue collection of essays opens by looking at some important issues in the family system during the Qing dynasty (1644-1912) by means of an impressive examination of the concern of the imperial authorities to apply the law correctly in cases of the homicide of a wife's lover by that wife's aggrieved husband. Although submitted separately to the *Journal* and therefore not part of the original workshop, nor specifically focused on family law, Professor MacCormack's paper entitled 'Homicide, Adultery, and Judicial Reasoning in Qing China', nevertheless illustrates many important aspects of the regulation of the family, and especially the significance of maintaining correct hierarchical relations within the family, in traditional Chinese society, morality and law. Geoffrey MacCormack's essay examines the statutory development of two contrasting rules governing homicide arising from adultery during the Qing (1644-1911), one concerned with the liability of the wife whose lover had killed her husband, the other with the immunity of the husband who had killed the adulterous couple. Thus, for example, if the adulterer was the husband's brother then whether he was a senior or junior brother mattered greatly in determining punishment if the case came to the attention of, and was handled by, the authorities. The contributed essay attempts to answer the question of how unfettered the discretion of the Board of Punishments in was proposing solutions for situations not precisely covered by the wording of statutes, through tracing the statutory development of the two rules governing homicides arising from adultery, and in so doing, the essay also sheds light on the manner in which judicial authorities handled adjudication and statutory development.

The essay argues that Board of Punishments did not have unfettered discretion. The Board regarded the statutes as prescriptions, instead of guidelines, and accordingly had to ascertain their intention and meaning through interpretation and by drawing on analogy, in order to determine the legally correct offence and punishment for the facts

<sup>12</sup> Tai Yen-hui (1978) 'Divorce in Traditional Chinese Law' in Buxbaum, D (ed) *Chinese Family in Comparative and Historical Perspective* University of Washington Press 75 at 80.

<sup>13</sup> *Ibid* at 82.

of the case. In addition, it did not have general discretion in selecting and applying the statutory rules. Instead, it had to select and apply rules that were relevant to the facts. The Board at all times considered itself as bound by the actual terms of the statutes relevant to the facts before it and sought to determine the case which, on a reasonable construction of the language, fell within the scope of those terms.

Through Geoffrey MacCormack's analysis we see also the enshrining in the law of the patriarchal values of Confucianism. Of particular relevance in the context of adultery is the legal relationship of husband and wife. In the first place the wife formally constitutes the 'junior' in the relationship, with the usual consequences in the disparity of treatment in offences committed by the one against the other. For like offences (such as beating or cursing) the punishment for the junior (wife) is considerably heavier than that for the senior (husband). But more significant is the imbalance in the respective legal position of husband and wife in the event of either spouse's death in consequence of the adultery. Should the husband be killed by his wife's lover, she, albeit ignorant of the homicide, still is punished capitally. Conversely, should the husband have committed adultery, he bears no liability for the homicide if his lover without his knowledge kills his wife.

### **Reform under the Da Li Yuan**

The Taiping rebellion of the 1860s offered a competing ideology, with radical reforms proposed and to some extent put into effect, removing some of the more patriarchal elements in family life and social position.<sup>14</sup> Although the Taiping rebellion was short lived and followed by a conservative reaction in the form of a Confucian restoration,<sup>15</sup> nevertheless proposals for reform of the family continued, especially after the 1911 Republican revolution and then the May Fourth (1919 and thereafter) Movement.<sup>16</sup> The drive for reform of the family and the social relationships within the family became an important part of efforts at the wider transformation of Chinese society and the creation of a modern and powerful nation-state. The 1911 Revolution brought an end to rule by the imperial government and introduced the Republic of China. A new constitution was introduced in 1912, and in a broad reorganization of judicial institutions, the Da Li Yuan was established as a provisional Supreme Court, serving as the final court of appeal in the new Republic. In the absence of substantive legislative reform, the Court came to interpret and re-interpret earlier law that had been inherited by the new regime. Its approach to interpreting the old laws, including traditional rules on divorce, paved the way for the reform of civil law in later years. This reform found fullest expression in the 1930 Civil Code, Books IV, and V. However, a great deal of this legal reform of the family in the Code was also carried out by the judges of the Da Li Yuan.

In the contribution to the Special Issue by Professor Max Wong Wai-lun, entitled 'Continuity or Empowerment?': Judicial Interpretation of Divorce in the Da Li Yuan in

<sup>14</sup> See, Shih, Vincent YC (1967) *Taiping Ideology: Its Sources, Interpretations, and Influences* University of Washington Press especially 60-73; .

<sup>15</sup> Wright, Mary C (1957 rpr 1974) *The Last Stand of Chinese Conservatism: The T'ung-Chih Restoration, 1862-1874* Stanford University Press.

<sup>16</sup> See, for example, Lopez, Hector (2016) 'Daughters of the May Fourth, Orphans of Revolution' (9) *History in the Making* Article 6, at <https://scholarworks.lib.csusb.edu/cgi/viewcontent.cgi?article=1050&context=history-in-the-making>



early Republican China' it is argued that the Da Li Yuan expanded the rules of divorce in the Great Qing Code (GQC)—reforming such matters as the husband's seven grounds for unilateral divorce, dissolution of marriage by mutual consent, the conduct of a wife in relation to the duties between the matrimonial and issues of domestic abuse<sup>17</sup>—the Da Li Yuan adopted an innovative approach to interpretation and application of the traditional rules of the GQC on divorce, including the 'seven-outs'—which afforded the husband unilateral grounds for divorce—the rights of a wife seeking judicial divorce, and the principle of dissolution of marriage by mutual consent in early Republican China. These judicial interpretations of the Da Li Yuan then paved the way to the new divorce rules based upon more 'Western' ideas in the new Civil Code. Seen in this light, the judgments of the Da Li Yuan on divorce can be said to have been fundamental to the attempts to reform family law in Republican China.

## PATRIARCHAL SOCIALISM: THE PROBLEM OF DOMESTIC ABUSE

### Family Law Reform under the Party-State

The approach of the CCP to family law reform after Liberation in 1949 was informed to a considerable extent by experiences in the areas that came under its control from the late 1920s onwards. This experience encouraged the development of a 'new democratic family' policy—which formed the basis of the New-Democratic marriage system (Xin-minzhuzhuyi Hunyin Zhidu) created by the 1950 Marriage Law. This did not reflect the established view of family reform in classical Marxism which saw the family as an institution of patriarchal authority that imposed gender and age inequality, so that under socialism, the family would wither away, women would be emancipated, and relationships between women and men regarded as private matters free from state intervention.<sup>18</sup> In contrast, the Party sought to reform the Chinese family, making it less constricting and more 'democratic', in order that it might contribute more effectively to the socialist transformation and economic development of Chinese society. The principal instruments of legal reform were the 1950 Marriage Law,<sup>19</sup> the 1951 Land Law<sup>20</sup> and the 1955 Marriage Registration Regulations.<sup>21</sup>

These reforms intended to eliminate many 'feudal' aspects of kinship, including the subordination of women, while at the same time promoting of freedom of marriage and access to divorce, and reshaping the family and household into forms that would serve

<sup>17</sup> Although many contributors to this Special Issue mainly use the term 'domestic violence', they see this phenomenon as including not only physical acts against a domestic partner, but also sexual, psychological, emotional, and economic abuse and coercion, with physical violence being the most prevalent form of abuse. See, for example, Palmer, Michael (2020) 'Violence' in Moscati, MF; Palmer, M; and Roberts, M (eds) *Comparative Dispute Resolution* Edward Elgar,

<sup>18</sup> Stacey, Judith (1979) 'Toward a Theory of Family and Revolution: Reflections on the Chinese Case' (26, 5) *Social Problems* 499 at 499.

<sup>19</sup> See Diamant, Neil J (2000) *Revolutionizing the Family: Politics, Love, and Divorce in Urban and Rural China, 1949-1968* University of California Press; Diamant, Neil J (2000) 'Re-examining the Impact of the 1950 Marriage Law: State Improvisation, Local Initiative and Rural Family Change' (161) *The China Quarterly* 171.

<sup>20</sup> See Diamant, Neil J (2000) *Revolutionizing the Family: Politics, Love, and Divorce in Urban and Rural China, 1949-1968* University of California Press, especially at 99-109 and 125-127; M Meijer, Marinus J (1971) *Marriage Law and Policy in the Chinese People's Republic* Hong Kong University Press at 69-70.

<sup>21</sup> Van der Valk, M (1957) 'The Registration of Marriage in Communist China' (16, 1-2) *Monumenta Serica* 347.



the interests of the new socialist state. Thus, for example, the spouses were afforded equal status in the home and 'freedom choice of occupation in work or in social activities', as well equally placed under an obligation to 'love, respect, assist and look after each other, to live in harmony, to engage in productive work, to care for their children and to strive jointly for the welfare of the family and for the building-up of the new society'.<sup>22</sup> Divorce by mutual consent through administrative organs was permitted, and in contested cases by the court if mediation failed.<sup>23</sup> The aim of China's new socialist rulers was to make the conjugal family a fundamental social unit in socialist development, political mobilization of support for the new regime. Not surprisingly, however, the impact of these legal reforms on social conduct was uneven and in the countryside in particular, not all the provisions of the code were vigorously enforced, especially in regard to contested divorces when the applicant was female. The administration of family law became in effect a system of patriarchal socialism, in which the socialist reforms in their practical application tended to be infused with traditional familial values and were male controlled.

### **Household registration**

Moreover, a *hukou* or household registration system has been used in the PRC since the 1950s, with the 1958 Household Registration Regulations being the key legislative document. These Regulations required families to maintain household registration booklets in which were recorded and identified the individual members of the family and indicated certain features as date of birth. It indicated a domestic place of domicile. The system had its origins in Imperial China but the system in the PRC was also a transplant from the Soviet Union. It was and still is administered by the Public Security Bureau and has important social control functions. Under the system of registration, a basic division was built in, until recently, with social welfare operating in a manner significantly more supportive of urban than rural areas. The system has also functioned to strictly control rural to urban migration. In more general terms, when combined with demographic policies which, after the early 1970s in particular, functioned to limit family size, the household registration system has directly and indirectly encouraged larger family size in rural areas. On the other hand, the size of urban families has been restricted more severely.

### **1980 Marriage Law**

The 1980 Marriage Law ushered in a period in which there has been an extensive codification of family law, culminating earlier this year in the 2020 Civil Code, containing separate Chapters on Marriage and Family, and on Succession, and replacing the 2001 revised Marriage Law and the 1986 Succession Law, respectively. The 1980 Law imposed a regulatory regime in which the family was to serve better the new development policies characterized as the 'Four Modernizations' and which made family planning obligatory, encouraged small family size, introduced provisions on inheritance and on adoption, raised the minimum age of marriage, in effect encouraged uxorilocal marriage, and encouraged relations of mutual support and care within the family.

<sup>22</sup> Marriage Law 1950, Articles 7, 8, and 9.

<sup>23</sup> Ibid, Article 17.

The provisions at Article 17 of the Marriage Law 1950 provided no substantive ground for divorce, offering only mediation as a processual recommendation for handling contested cases, and local practice varied in approving, disapproving or procrastinating requests for divorces. In order to remedy this situation, the 1980 Law stated that divorce should be granted ‘if mutual affection no longer exists’ (*ganqing polie*), and allowed the spouse seeking divorce to bring suit directly in the local people’s court, rather than first undergoing mediation. The local people’s court would nevertheless itself conduct mediation before a divorce decree could be granted.

In addition, the regulatory regime created by the 1980 Marriage Law was elaborated by several revisions of the marriage registration regulations, progressively restricting judicial recognition of unregistered marriages,<sup>24</sup> Supreme People’s Court Interpretations of provisions in the 1980 Law,<sup>25</sup> the introduction of provincial legislation localizing the provisions of the 1981 Law, and the development of social protection legislation following, in particular, ratification of the Women’s Convention, the Convention of the Rights of the Child, and the Economic Cultural and Social Rights Covenant, but also including at the purely domestic level the rights and interests of elders.<sup>26</sup>

## 2001 Revision

The provisions in the 1980 Marriage Law were significantly changed in the 2001 major revision to that law, and the revised law was the elaborated on itself by a range of other normative instruments. These included a series of Supreme People’s Court interpretations of the 2001 Marriage Law,<sup>27</sup> the introduction of revised marriage registration regulations

<sup>24</sup> See, for example, Palmer, M (2007) ‘Transforming family law in post-Deng China: Marriage, divorce and reproduction’ (191) *The China Quarterly* 671.

<sup>25</sup> Supreme People’s Court: (1989) ‘Guanyu renmin fayuan shenli lihun anjian ruhe rending fu-qi gangqing que yi polie de ruogan juti yijia’ (Some Specific Opinions regarding the definition of genuine alienation of affection between husband and wife in divorce cases tried by people’s courts); (1990) ‘Guanyu renmin fayuan shenli wei ban jiehun dengji er yi fu-qi mingyi tongju shenghuo anjian de ruogan yijian’ (Some Opinions regarding cases tried by people’s courts in which couples have lived together as husband and wife without carrying out marriage registration’), (1993) ‘Zuigao renmin fayuan guanyu renmin fayuan shenli lihun anjian chuli zinu-fuyang wenti de ruogan juti yijian’ (Several concrete opinions of the Supreme People’s Court on the problems of bringing up children in divorce cases handled by the Supreme People’s Court), 3 November 1993.

<sup>26</sup> Palmer, Michael (1999) ‘Protecting the rights and interests of the elderly: developments in the family law of the People’s Republic of China, 1996-8’ in Bainham, A. (ed) *The International Survey of Family Law: 1999* Kluwer (for The International Society on Family Law) 95.

<sup>27</sup> Supreme People’s Court: (2001) ‘Zuigao Renmin Fayuan Guanyu Shiyong “Zonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti de Jieshi [1]’ (Interpretation of the Supreme People’s Court on Several Problems Concerning the Application of the Marriage Law of the PRC [1]); Supreme People’s Court Gongheguo Hunyin Fa” Ruogan Wenti de Jieshi [2] (Interpretation of the Supreme People’s Court on Several Problems Concerning the Application of the Marriage Law of the PRC [2]); (2011) ‘Zuigao Renmin Fayuan Guanyu Shiyong “Zonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti de Jieshi [3]’ (Interpretation of the Supreme People’s Court on Several Problems Concerning the Application of the Marriage Law of the PRC [3]); (2017) Zuigao renmin fayuan guanyu shiyong “Zonghua Renmin Gongheguo Hunyin Fa” Ruogan Wenti de Jieshi (er) de buchong guiding’ (Supplementary Provisions on the Interpretations of the Supreme People’s Court on Several Issues Concerning the Application of the “Marriage Law of the People’s Republic of China [III]”’. Also see, Standing Committee of the National People’s Congress (2014) ‘Quanguo renmin daibiao dahui changwu weiyuanhui guanyu “Zonghua Renmin Gongheguo Minfa Tongze” dejushijiu tiao diyi kuan, “Zonghua Renmin Gongheguo Hunyin Fa” di ershertiao de jieshi’ di ershi’er tiaode jieshi (Interpretations of the Standing Committee of the National People’s Congress on Paragraph 1 of Article 99 of the General Principles of the Civil Law of the People’s Republic of China and Article 22 of the Marriage Law of the People’s Republic of China).

in 2003, and the strengthening of social protection legislation.<sup>28</sup> The reforms in 2001 of the Marriage Law were accompanied by often heated debate, often publicly expressed, of key issues ranging from judicial divorce through to concubinage, matrimonial property, and the possibility of same sex marriage. It is possible to discern in these arguments, and in some of the substantive legal changes introduced in the reforms, a relaxation in the boundaries placed on private life in both the contents of the law and the debates about the nature of marriage and family law.

### **Population and birth limitation**

A critically important dimension of the family's role in promoting economic reform was the reshaping of the family through a party-state imposed regime of population control. From the at least the early 1970s onwards the PRC pursued policies of population control, initially in quantitative terms but subsequently also in qualitative terms and these policies impacted on the 1980 Marriage Law. The revised Code accordingly not only introduced important reforms in the area of marriage family relations and divorce but also provided measures for dealing with perceived problems of over-population. Article 12 imposed a mandatory duty of birth control on wife and husband. In addition, the minimum legal ages of marriage were significantly increased,<sup>29</sup> the law prohibited marriage with close kin on grounds of eugenics, uxorilocal post marriage residence was encouraged to provide greater support with daughters—who being daughters were very likely to move to the husband's family upon marriage.

At the end of the year 2001, there was a further and very significant development: the introduction of a full law on population and birth planning.<sup>30</sup> This was a much more circumspect change, with a little open debate. It nevertheless made birth planning a fundamental policy of the state and formalised limited family size at the national level. Hitherto much of the substantive population law had been developed at the provincial level. The 2001 Population and Birth Planning Law was elaborated on by the 2003 Social Upbringing Regulations. Together, these rules signalled a transformation in the punishment regime with penalties targeted more firmly at financial sanctions, with fewer coercive measures.<sup>31</sup>

### **Developmental policy shift to harmonious society**

But within several years of the 2001 revision to the Marriage Law, the development policy context was expanded so that not only was contribution to the economic reforms seen as an important aspect of the family, but also the family was expected now to contribute to the creation of a harmonious society. This was one of the factors encouraging greater

<sup>28</sup> Palmer 'Transformation' supra note 24; Palmer, M, (2012) 'China', in Sutherland, E (ed) *The Future of Family and Child Law* Cambridge University Press 112.

<sup>29</sup> Although an unintended consequence in practice of this adjustment and greater formalization of minimum ages of marriage was a decrease in the age of marriage in those areas where administrative practice had raised the minimum significantly higher than the legal requirement: see, for example, Susan Greenhalgh's observations regarding the situation in 'The peasantization of the one-child policy in Shaanxi' in Davis, D and Harrell, S (1993) *Chinese Families in the Post-Mao Era* University of California Press 219 at 233-36.

<sup>30</sup> Palmer 'Transformation' supra note 24.

<sup>31</sup> Palmer 'Transformation' supra note 24.

official attention to the problem of a rising divorce rate, but perhaps more importantly to the problem of domestic violence and similar forms of abuse (*jiating baoli*). Other factors include very rapid socio-economic change, international pressures (especially from the CEDAW committee)<sup>32</sup> and growing understanding of the need to better limit and control aggressive misconduct by husbands. Accordingly, at Article 43 of the revised Marriage Law, a new provision was introduced in order to promote better protection of female victims. Henceforth, domestic abuse was seen more clearly as an issue of public concern and therefore also a matter for criminal law enforcement with court-imposed punishments, and not only administrative penalties but also court-imposed punishments. Nevertheless—as seen also in the 2005 revised Women’s Protection Law<sup>33</sup>—women suffering domestic abuse were encouraged to have their grievances dealt with by people’s mediation in the first instance. More than a decade later, the National People’s Congress somewhat belatedly introduced a full anti domestic violence law.<sup>34</sup> The contributions below by Chan and Xiao, D’Attoma and Michelson take up important issues in the ways in which domestic violence is conceptualised and dealt with in practice.

### Weak criminalization

Professors Peter Chan and Xiao Huina contribute to the Special Issue a paper entitled ‘Weak Criminalization of Domestic Violence in China: Two Key Weaknesses’. Their study deals with the difficulties that arise from the limited criminalization of domestic violence, in both substantive and procedural terms, by the criminal justice system.

Thus, they argue that substantive law is weak in at least four respects: the law does not effectively define and punish domestic violence, enforcement provisions in the law are weak and ambiguous, the overall objectives of the substantive law are inconsistent, and the law does not give sufficient guidance to law enforcement agencies in their handling of incidents of domestic violence.

In terms of the processes of criminal justice, the frailties are perhaps even more serious. Thus, there is a failure by the police in their law enforcement work to give sufficient weight to domestic violence cases—the police (public security personnel) often consider such cases to be ‘merely’ family matters. A second key weakness is that the provisions of Chinese criminal procedure provide only a very limited deterrence regime regarding domestic violence, as evidenced in the low prosecution rate, the fact that the overwhelming majority of prosecutions and convictions relate to physical forms of domestic violence (so that non-physical forms of domestic violence are basically in practice ignored in the criminal justice system), a less robust approach to police intervention as an instrument of deterrence in less developed areas, and inconsistent conviction and sentencing.

Also, the police are not incentivised sufficiently to implement and to enforce the protection order system, perhaps most markedly so in the more underdeveloped areas of China. To a significant extent, this weakness reflects a performance appraisal system that prioritises detection work in what are regarded as more genuinely serious criminal cases.

<sup>32</sup> Palmer ‘Domestic Violence’ *supra* note 5 at 287

<sup>33</sup> See, for example, Palmer M (2005) ‘On China’s slow boat to women’s rights: revisions to the Women’s Protection Law’ (11, 2) *International Journal of Human Rights* 151.

<sup>34</sup> Palmer ‘Domestic Violence’ *supra* note 5.

Important too in explaining the problem of limited police impact is the practice of pre-trial cooperation between the police, the procuracy and the courts. Here, the police definition of the situation prevails, with the agencies inclined to allow the police characterisation to prevail. So, in effect, law enforcement agencies combine to restrict access to gender justice.

### **Limited Protection**

The essay contributed by Professor Sarah D'Attoma, ' "To Promote Family Harmony and Social Stability": Is the Anti-Domestic Violence Law of the People's Republic of China an Effective Legal Response?', explores the issue of whether the long-awaited 2015 PRC Anti-Domestic Violence Law has been effective in curbing domestic violence. It looks at the Law in the context of party-state's continuing promotion also of policies of 'family harmony', and 'social stability'. The issue of domestic violence and abuse is especially important not only in terms of gender justice, but also because the family remains the basic unit in Chinese society, and the effectiveness of the Chinese government's efforts in combating domestic violence and fulfilling its international commitments in regard to family and gender issues is in itself a highly significant question. The paper argues that the new Law intends to strengthen the prevention network and promote family harmony in order to combat violent conduct without undermining the family unit and social stability. For this purpose, personal safety protection orders and China's ubiquitous mediation system are relied on in the hope of preventing and effectively managing cases of domestic violence, while at the same time maintaining familial bonds between the victim and abuser. In a sense a type of informal justice has also been adopted as a solution in the sense that responsibilities have been devolved to civil society to participate in combating domestic violence.

However, the contribution concludes that the Anti-Domestic Violence Law has to date not been very effective. Judges and Public Security officers tend to treat domestic violence as a minor issue, and to prioritize family integrity over protecting victims from further domestic violence and threats to use such violence. Mediation, which is emphasized by the Law and oftentimes favoured in matrimonial judicial practice, may prolong the application for protection orders and the incidence of domestic violence. Stringent evidence standards for applying for protection orders further undermine the protection that is supposed to be given to the victims under the new legislation. Being mostly located in urban areas, civil society organizations are unable to provide effective services to victims in rural areas. The lack of funding for women's organizations is also hindering the efforts of such organizations to provide legal aid to women and to spread understanding of the value of gender equality. The sanctioning system is also ineffective as a deterrent. The Law's inability to protect victims is also reflected in the increasing numbers of domestic violence complaints made during Covid 19 pandemic. As the current approach is unable to effectively respond to the domestic violence problem, this paper explores how the Anti-Domestic Violence Law might be further developed, so that it becomes a more structured and effective system—one that better copes with domestic violence.

### **Handling domestic violence in divorce cases**

In his analysis of many decisions in divorce cases handled by courts in Henan and Zhejiang in which a custody order has been granted, entitled 'Possession is Nine-Tenths of the Law:

Why Wife-Beaters Are Awarded Child Custody in China's Divorce Courts' Professor Ethan Michelson points to a marked divergence between the legal provisions on custody in the Marriage Law, as well as in Supreme People's Court guidance, and judicial practice. Judges are inclined to follow not the official normative framework, and to follow instead in their decision-making entrenched patrilineal and patrilocal social practices and values. In the eyes of many judges, the issue of the suitability of an abusive husband as a parent is discounted, women's allegations of domestic abuse are downplayed, and as a matter of judicial expediency (seeking an outcome of least resistance) judges are strongly inclined to grant fathers child custody where the child already resides with the father. Abused women are thus twice disadvantaged, both failing to gain custody of their children, as well as failing to have their allegations of domestic abuse properly considered by the court.

The problem remains particularly acute in rural areas, which contribute the vast majority of divorce cases adjudicated by courts, and where patriarchal values and practices persist. It is less serious in urban areas, where conservative values no longer prevail have weakened so that women are more inclined to seek child custody, and the courts more willing to grant it. In general, however, allegations of domestic abuse do not impact on judicial decision-making in child custody cases. Instead, men (including abusive male partners)—who already have physical possession of their children—are favoured because judges are reluctant to issue an award that challenges that fact. Underlying this is the harsh reality that abused women who walk out of the domestic home in order to avoid further mistreatment, will usually often leave their children behind. Thus, despite the formal commitment in family law to gender equality and the best interests of the child<sup>35</sup> the reality is that these are not reflected in judicial practice, to the point where courts might even put pressure on abused women through judge-facilitated negotiation and settlement that favour male parties in issues of child-custody and matrimonial property. In rural areas especially, family law has failed to challenge China's rural patriarchal order. Barring a profound shift in judicial practices, until China's socioeconomic reforms and demographic changes have a positive impact, women will continue to suffer these forms of discrimination.

## CONTESTED DIVORCE: LOCAL JUDICIAL PRACTICE

Professor Michelson's paper links us to a second dimension of the examination of matrimonial relations, namely the processes of contested divorce. This too, continues to be a controversial area of law and practice, and various aspects of this topic are the subject of essays contributed by Wang Juan and Mu Hongqin, Fu Yulin and Xie Fang, He Xin, and Wang Yu and Ng Kwai Hang.

### Changing values and institutionalization

In their contribution entitled "'It's Not Just About the Divorce': Law, Politics, and Mediation in Communist China' Professors Wang Juan and Mu Hongqin look at the Chinese communist style of mediation used in the early period of the institutionalization

<sup>35</sup> Palmer, M (2010) 'Rethinking Children's Rights and Interests? Economic Reform, Social Protection and Legal Culture in Post-Mao China' (5, 2) *Journal of Comparative Law* 260.



of CCP rule for handling civil disputes and its impact on the implementation of the 1950 Marriage Law. With its stress on absolute criteria right and wrong,<sup>36</sup> the Chinese communist style of mediation for handling civil disputes was highly evaluative.<sup>37</sup> This style undermined article 17 of the Marriage Law—that is, the value of compromise that hopefully would lead to reconciliation between the matrimonial parties. The paper is a documentary analysis of letters drafted by local level officials to a county court in central China. It shows that three styles of text intertwined in these letters: traditional values that emphasize family harmony and correct hierarchical ordering within the family, legal observations and assessments that showed local officials' awareness of the 1950 Marriage Law, as well as political language that manifested local officials' eagerness to comply with national political interests. Whereas the use of language reflecting traditional values declined over time, familial values continued to help local officials identify the parties at fault in a matrimonial case, be it a gossipy mother-in-law or a disobedient wife. The proposals to handle the faulty parties, however, were not traditional in that they did not call for compromise nor did they stress the dominant interests of the husband. In addition, the proposals rarely followed the emphasis on the primacy of mediation as provided for in the 1950 Marriage Law. Rather, they often called for punishment because private marriage disputes were elevated to political struggle between what was seen as politically right and what was viewed as incorrect and wrong. Overall, local agents used, and were sensitive to, national agenda interests, in such a way as to undermine the legal reforms which the regime had itself put in place through the 1950 Marriage Law. In this sense, political morality supplanted traditional morality in family matters.

### **Looking to fit the forum to the matrimonial fuss**

The essay contributed by Professors Fu Yulin and Xie Fang is entitled 'Adjudication of Divorce Cases in China: A Study of 100 Pilot Cases' is focused on matrimonial disputes that come before the people's courts. Their study explores the procedural issues to which divorce claims have given rise, and examines how current reforms are being carried out in order to fit the processes of the judicial forum to the fuss of the matrimonial dispute.<sup>38</sup> These reforms take place in a context in which the official perception is that current divorce rates are too high and are growing too fast. The authors note how in the period following the PRC's 1991 Civil Procedure reform, the general emphasis was placed on processes perceived to meet the needs of commercial cases. The resulting system, with its emphasis on adversarial confrontation was not necessarily appropriate for matrimonial disputes, but was nevertheless relied on by the courts in response to the exponential expansion of civil caseloads. This left the courts unable to pursue the use of mediation as encouraged and provided for in the revised 2001 Marriage Law.

This approach changed direction with a series of Supreme People's Court interpretations encouraging judicial practice reform and by the party state's new post 2004

<sup>36</sup> See, for example, Palmer, M (2007) 'Ma Xiwu 1899-1962' in Clarke, David S (ed) *Encyclopaedia of Law and Society: American and Global Perspectives* Sage Publications; Lubman, S (1967) 'Mao and Mediation: Politics and Dispute Resolution in Communist China' (55, 5) *California Law Review* 1284-1359.

<sup>37</sup> It continues to be so, but with compromise outcomes much more preferred officially.

<sup>38</sup> Sander, F and Goldberg, S (1994) 'Fitting the forum to the fuss: A user-friendly guide to selecting an ADR procedure' (10) *Negotiation Journal* 49.



developmental goal of creating a harmonious society so that the mediation of matrimonial disputes, including judicial mediation and court-linked mediation came back into vogue, and the sense of a need for civil procedure to offer a distinctive approach more suitable for handling matrimonial cases became stronger.

Under the CCP's robust programme of judicial reform introduced in 2013, experimental efforts with family trials have been made in pilot courts especially from the middle of 2016 onwards. In addition, from 2015 some courts have applied a cooling off period system (*lihun lengjingqi zhidu*) in divorce proceedings so as to help what are regarded as emotional barriers to communication between the parties. This approach has been extended and formalised to divorce by mutual consent in Article 1077 of the new Civil Code 2020. The emphasis on the importance and benefits of such an interregnum in the proceedings is a matter of considerable debate within both legal circles and the public also important is the conceptual distinction introduced by the Supreme People's Court in 2015 between marriages which are characterised as only 'in crisis' and those in which the state of the matrimonial dispute shows that the marriage is effectively 'dead'. These developments reflect an overall policy concern to limit the increasing divorce rate, while at the same time not undermining the principle of freedom of divorce

### **Matrimonial property in contested divorce**

Professor Xin He's contribution asks: How do the judges divide property between men and women in divorce litigation, when the legal provisions already tend to favour men? Can the existing promises of the law protecting women's interests be fulfilled? Have the court practices exacerbated a situation where the substantive laws are already unfair? Based on empirical observations on how the courts make decisions, He contends that throughout the proceedings, the judges' concerns for self-protection and efficiency have further disadvantaged women in property divisions. Women often have to give up their property rights in return for a divorce or the award of child custody. Delaying an unavoidable divorce decision, and a 'bidding' (*jingjia*) process for a wife who has no other place to live, contribute to women's distress. Additionally, judges are often indifferent to the generally substandard legal services women endure. The division of conjugal property illustrates how judges, under institutional constraints, have let the 'haves,' mostly men, come about ahead.

Xin He's contribution demonstrates that under institutional constraints, Chinese judges adopt approaches that are harmful to women's property interests throughout the divorce process. The existing literature is correct in identifying that the changed legislative orientation disadvantages women in terms of property division. Yet, judges' concerns have aggravated the situation. To end a case efficiently and without lingering effects, women have to forgo their property rights, usually their only bargaining chip, in exchange for either divorce or child custody. A delayed decision for inevitable divorces, a seemingly neutral approach, disadvantages women more than men. Due to the gendered financial disparity, women lose in the bidding process for the conjugal home. These factors each indicate that in addition to the unfair legal stipulations, institutional constraints have further perpetuated gendered outcomes.

## **Judicial decision-making**

'By the Law?: How Chinese Judges Rule on Contested Divorces' is an essay contributed by Professors Wang Yu and Ng Kwai Hang. Their analysis looks at the impact of the greater personal freedoms that have been generated primarily by economic reform in the post Mao era within a tightly demarcated private sphere. There is now relative freedom within these confines, whilst in the more public sphere there remains tight control by the party-state and Chinese courts are expected to play a significant role in regulating disputes and social conflict in the interests of the party-state—this function is what the authors call a 'socio-moral role'. Accordingly, while a matrimonial dispute is on the surface a private matter, in reality the courts to consider the likely social consequences—for example, the estimated risks and the social costs of divorce. In so doing, they in effect practice traditional paternalism in their decision-making in contested divorces, and this is sometimes inconsistent with the written provisions of the law. Thus, for example in matrimonial cases involving domestic violence the courts take both social and extra-legal factors into consideration as well as the law itself. Also the courts are inconsistent in their application of the provisions of article 32 which specify the grounds for divorce in the PRC.<sup>39</sup> Factors likely to encourage the judge to allow divorce include that there had been separation and also extra marital relations. However, substance abuse and gambling and even domestic violence are—it would seem—not critically important factors in the minds of the judges even though the government and Supreme People's Court consider domestic violence to be a serious social issue. The authors note the development of adversarial style litigiousness which is paralleled by the time limitations on the conduct of independent on-site investigations. The social dimension of judicial decision making can also be seen in the rejection of petitions which in the eyes of the court might lead, if divorce is granted, to social disruption and greater hardship for the socially disadvantaged. It seems that nowadays the courts are reluctant to approve a petition submitted by a husband looking to divorce his wife. Especially if the wife is also a mother in the countryside areas of Beijing it is also easier for women to get their petitions approved although less so than in the urban area. So overall it seems that social costs tend to encourage the courts to reject petitions by men rather than those brought by women. The stronger mediation filter for divorce petitions in rural areas means that, somewhat paradoxically, rural courts are more likely to approve the first time petition than are urban courts where mediation is now much less effective than it once was

## ENTER CHINA'S NEW CIVIL CODE

After several decades of contemplating the introduction of a comprehensive Civil Code, in May 2020 (when most of the papers for this Special Issue had already been completed) an important legislative instrument—the Minfadian—was promulgated and will come into force on January 1, 2021. It contains seven Parts, and includes in Part Five provisions on marriage and the family (Hunyin Jiating), and in Part Six provisions on inheritance.

<sup>39</sup> Under the new Civil Code 2020, this will be Article 1079.

## Part Five

The scope of Part Five includes rules that were previously provided for in separate codes: the 2001 Marriage Law and the 1998 Adoption Law. These Laws will no longer be in force when the Civil Code becomes law (Article 1260, Civil Code, 2020). The Part is itself organized into five Chapters, namely General Provisions, Marriage, Family Relationships (Jiating Guanxi), Divorce and Adoption. Perhaps the most controversial area of the new law governing marriage and family is to be found in the provisions on divorce. The Civil Code affords two modes of divorce, mutual consent through joint application for official registration of the divorce, or divorce proceedings in court. In the latter case, the Civil Code provision at Article 1979 replicates the provisions of Article 32 in the 2001 Marriage Law. In judicial divorce proceedings, the court will mediate the case in the hope of securing a settlement between the spouses that avoids a divorce. If mediatory intervention is ineffective and the court considers the marriage to be irreversibly broken, then the court will grant a divorce. A number of contributions to this Special Issue point to judicial practices that make this process much more complex than the bare provisions of the Code suggest.

### Divorce by mutual consent: elaboration

However, in the case of divorce by mutual consent (*fuqi shuangfang ziyuan lihun*: ‘voluntary divorce’) the Civil Code elaborates significantly in its Articles 1076, 1077, and 1078 on the provisions in Article 31 of the 2001 Marriage Law. A divorce may be approved and registered with the relevant administrative organ (typically the marriage registration section of the local civil affairs bureau) if both parties voluntarily agree to the divorce, draw up and sign their divorce agreement in writing and file a corresponding divorce application. Nevertheless, Article 1077, building on the experimentations with ‘cooling off’ periods carried out in some of the pilot court projects noted in several contributed essays to this Special Issue, introduces a requirement for divorce by mutual agreement a period of delay of thirty days from the application filing date. During this period, it is open to one of the spouses alone to withdraw the divorce application:

Article 1077: Where either spouse is unwilling to divorce within 30 days after the relevant marriage registration authority has received the divorce registration application, either spouse may withdraw the divorce registration application from the marriage registration authority.

It is clear that Article 1077 is a legislative response to official worries about a rising divorce rate—from some 2.5 million in 2010 to some 4.7 million in 2019, some 80 per cent of which are now divorces by mutual consent and continuing to grow.<sup>40</sup> The administrative processes of mutual consent divorce have become the preferred forum for married couples who wish to end their matrimonial relationship, perhaps too impulsively so in the eyes of the party state. In this official view, ending a marriage is not entirely a private matter as

<sup>40</sup> Ministry of Civil Affairs (2020) *2019 nian minzheng shiye fazhan tongji gongbao* (2019 Statistical Bulletin on the Development of Civil Affairs) 1 especially at 14, issued on 8 September 2020 and available at <http://images3.mca.gov.cn/www2017/file/202009/1601261242921.pdf>

there is a public interest in avoiding the harmful impact of divorce on society and other family members. Many experts and members of the general public disagree and see the cooling off interval as an impediment to freedom of divorce, especially for women. The latter may suffer at the hands of husbands who misuse the cooling off period to plunder the matrimonial estate, to commit other forms of misconduct which only come to light subsequently, and to continue inflicting domestic violence on their spouse.<sup>41</sup>

### **Population control: silence**

However, nowhere in the Civil Code does the law and policy on population and birth planning receive mention. The Code does not itself repeal the Population and Birth Planning Law (revised, 2015) and it seems there are no immediate plans for that Law to be abandoned. The 2015 revision allow married couples to have two children, and in due course provincial-level regulations followed suit, and offered detailed rules on birth planning. The concerns of the party-state prompting relaxation of quantitative aspects of the system include the pressures of an aging population, a dwindling workforce, increasing expenditure costs for pensions, health provision and other forms of social welfare. In addition, for many families, raising more than one child in China today is seen as too costly.

Nevertheless, any further removal of limits on reproduction and therefor family size would be an important change for Chinese society and the place of women in it. Many of the problems on the population control system have disproportionately affected women: violence, gender selective abortion, female infanticide, forced sterilization, and so on, and at the societal level there are marked imbalances in the ratio between males and females. The excise of planned birth requirements from the Chapter on marriage and the family in the 2020 Civil Code is hopefully therefore a progressive step.

## **FINAL THOUGHTS**

Issues in the legal regulation of the family arise from the nature of the social relationships within the family or domestic context and the wider society and legal system in which they are located. In many societies and jurisdictions around the world, domestic relations are formed, rights and responsibilities within the domestic unit are established and likely change over time, there are norms governing entitlements in respect of the 'family' home and other property and monetary assets (including through inheritance), there will be reproduction issues in parent child relations (including adoption), the welfare of family members has to be taken into account, and processes for handling relationship breakdown (including the presence of domestic abuse and harassment). The PRC's family and domestic relations law provides for all such matters, but the essays in this Special Issue point to significant weaknesses in the manner in which, especially in practice, women are discriminated against, especially in the judicial process in matters of domestic abuse and dissolution of marriage. This continuing discrimination persists as a feature of Chinese family culture on the mainland.

<sup>41</sup> Civil Code at Article 1070 will continue to make domestic violence a ground for divorce, and Article 1079 will also give the victim a right to claim compensation from the abusive partner.

From the perspective of comparative legal studies discourse, including comparative studies of the family, the analysis of Chinese family law, both in terms of its formal rules and social and legal practices, has been given relatively limited attention. Yet analyses of Chinese family law developments encourage the researcher to engage fully with the context in which legal advances occur or where it seems to inhibit developments. In particular, noting that some areas of family law do not receive attention in the law, the comparative family law researcher needs to consider why this is so.

For example, a comparative analysis supported by interdisciplinary literature shows that the forms that families take are various. Susan Golombok suggests that together with the traditional families, there are non-traditional families created after break-ups, and new forms of family.<sup>42</sup> She defines new families as family forms that either did not exist or which were hidden from society until the latter part of the twentieth century, and which represent a more fundamental shift away from traditional family structures than do non-traditional families formed by relationship breakdown and reformation. New family forms include, among others, families based on same-sex relationships; single lesbian mother families; families created by assisted reproduction, and so on.

However, not all forms of family receive the same degree of legal protection everywhere. New forms of family are emerging in the People's Republic,<sup>43</sup> but they do not yet receive the legal recognition and protection that they should. The law lags behind social practice, and the reasons for the limited legal protection need to be explored—what are the historical, political, cultural factors which hinder legal developments—both substantive and procedural—aimed at protecting a variety of family forms. Addressing such queries though research has both methodological value and implications for social policy. As the contributions to this Special Issue show, the researcher will likely need to draw on the finding and insights of other disciplines and in-depth analysis of contextual issues, and go beyond a pure doctrinal approach. This, in turn, might unveil the manner in which systemic inequalities have permeated normative legal frameworks concerning the family.

More study of Chinese domestic relations and family law might also help comparativist to better avoid parochial interpretation of family law. The essays in this Special Issue suggest that the China case should be given much more consideration in the discourses of comparative legal studies. At the moment 'comparative legal studies of the family' still tend to be European or North American centric. Such approaches to easily overlook important legal developments elsewhere in the world.

Thus, for example, an issue which is rather neglected in terms general comparative analysis, is the study of the manner in which family laws consider the role of the elderly within the family. However, a comprehensive and detailed legal framework is found in the People's Republic. In particular, care for the elderly is embedded within the family legal culture of the PRC and is conceptualized in terms of moral and material duties for the members of the family. The support for the elderly is multidimensional involving financial, emotional, and psychological assistance, as well as respect for, and protection of, the rights and interests of the elderly. In contrast to many other jurisdictions, China has

<sup>42</sup> Golombok, Susan (2015) *Modern Families. Parents and Children in New Family Forms* Cambridge University Press.

<sup>43</sup> Palmer, M (2013) 'Floating Clouds and Feudal Commodifications: Family, Law and Reform in the Contemporary PRC' paper delivered to the Contemporary China Institute, SOAS, 4 February 2013.

had on the statute book an elders law for some 25 years, bringing together an otherwise disjointed rights structure for elder persons, characterizing those rights (and interests) in terms shaped by Chinese family culture, and putting in place processes that enhance access to justice in respect of the rights and interests relating to older persons. This has been somewhat ahead of the United Nations' proposed Convention on the Rights of Older Persons, which will probably become the next major human rights treaty to be adopted by the United Nations but is still under preparation.<sup>44</sup>

The essays in this Special Issue may thus contribute to bringing together more effectively comparative family law and the policy and legal dimensions of the regulation of the family in China today. They show how in the China case we have to explain family regulation issues in terms of at least four major factors: control by the party-state, rights and interests of the individual, family ideology and its continued embrace of patriarchy, and localized social practice. Clearly, insights into issues of domestic violence against female partners and gender discrimination in contested divorce in China are important for the comparative study of family law. Other distinctive and relevant features of the regulatory framework for the family and the practice of family law in China include gender, reproduction, 'fake divorce',<sup>45</sup> matrimonial property, inheritance, and the domestic relations of LGBTQ+ partners.

GLOSSARY OF CHINESE TERMS

Romanisation (Hanyu Pinyin)	Chinese Characters	English Translation
Da Li Yuan	大理院	Supreme Court
ganqing polie	感情破裂	breakdown of mutual affection
fu si cong zi	夫死从子	obedience to one's sons in widowhood
fude	妇德	female virtue
fugong	妇功	diligently performed female work
fuqi shuangfang ziyuan lihun	夫妻双方自愿离婚	voluntary divorce
furong	妇容	modest female appearance
fuyan	妇言	appropriate female speech
heli	和离	divorce by mutual consent
ji jia cong fu	既嫁从夫	be obedient to one's husband when married
jia	家	family

<sup>44</sup> See, for example, Sabatino, C (2019) 'Emerging Human Rights Perspective of Aging' 17 November 2019, (41, 2) *Bifocal (Journal of the American Bar Association Commission on Law and Aging)* at [https://www.americanbar.org/groups/law\\_aging/publications/bifocal/vol-41/volume-41-issue-2/emerging-human-rights-perspective-of-aging/](https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/volume-41-issue-2/emerging-human-rights-perspective-of-aging/); Herro, A (2019) 'Advocating a UN Convention on the Rights of Older Persons in the United Kingdom: The Case for a Radical Flank' (11,1) *Journal of Human Rights Practice* 132.

<sup>45</sup> Cai, Lidong and Qi, Yingcheng (2019) 'Judicial Governance of "Fake Divorce" with Chinese Characteristics: Practical Rationality of the Chinese Courts in the Transitional Period' in Björn Ahl; Cai, Lidong; and Xi, Chao *Special Issue: Data-Driven Approaches to Studying Chinese Judicial Practice* (19, 2) *The China Review* 99.

<i>jiahuzhuyi</i>	家戶主義	traditional familism
Jiating Guanxi	家庭关系	familyrelationships
<i>jiating baoli</i>	家庭暴力	domestic/family violence
<i>jingjia</i>	竞价	bidding
<i>lihun lengjingqi zhidu</i>	离婚冷静期制度	cooling off period system
Minfadian	民法典	Civil Code
<i>qi</i>	氣	essence
<i>qichu</i>	七出	seven outs (intolerable acts by the wife)
<i>san cong si de</i>	三從四德	Three Obediences and Four Virtues
<i>tongju gongcai</i>	同居共財	cohabiting, with assets pooled
Xin minzhu zhuyi hunyin zhidu	新民主主義婚姻制度	The New-Democratic marriage system
<i>wei jia cong fu</i>	未嫁從父	be obedient to one's father before marriage
<i>wulun</i>	五倫	five human relationships
<i>yiti</i>	一體	of one body (joined together by Heaven)
<i>jiazhang</i>	家長	family head